JUN 2 1995

(3)

No. 94-1819

In The

Supreme Court of the United States

October Term, 1994

TODD FOX, *et al.*,

Petitioners,

v.

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND PROPOSED BRIEF OF *AMICUS CURIAE* THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LANNY E. WALTER, ESQ.
Counsel of Record
MARK S. MISHLER, ESQ.
WALTER, THAYER & MISHLER, P.C.
Attorneys for Proposed Amicus Curiae
One Columbia Place
Albany, NY 12207
(518) 462-6753

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

159

No. 94-1819

In The

Supreme Court of the United States

October Term, 1994

TODD FOX, *et al.*,

Petitioners,

v.

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Proposed *amicus*, the Student Association of the State University of New York, Inc. (SASU) moves for leave to file the attached proposed brief, *amicus curiae* in support of plaintiff petitioners' petition for writ of certiorari.

The interest of proposed *amicus* in this matter derives from its longstanding advocacy on behalf of the rights of students at public institutions of higher education in New York State.

SASU has appeared twice previously as *amicus curiae* in this litigation, once before the Second Circuit Court of Appeals and also when this action was heard by this

Court during the 1988 term. *Fox v. Board of Trustees*, 492 U.S. 469 (1989). On both prior occasions, proposed *amicus* appeared by consent of all parties, a recognition of the important interest and stake proposed *amicus* has regarding the issues addressed by this litigation.

At this time, Mark S. Mishler, Esq., counsel to proposed *amicus*, asked Daniel Smirlock, Assistant Attorney General, State of New York, counsel of record for respondents herein, for consent to again appear as *amicus curiae* in regard to the petition for certiorari. In a telephone conversation on June 1, 1995, Mr. Smirlock expressly refused to consent to the submission by SASU of an *amicus* brief at this stage of the proceedings.

Proposed *amicus* submits that it has a unique perspective concerning the impact both of SUNY's unconstitutional regulation and the procedural details that have resulted in the possibility that the merits of this action will remain unaddressed. SASU, therefore, requests permission to file the attached proposed brief as a brief *amicus curiae* and asks that the brief be accepted by the Court.

Dated: June 2, 1995
Albany, New York

Respectfully submitted,

LANNY E. WALTER, ESQ.
Counsel of Record
MARK S. MISHLER, ESQ.
WALTER, THAYER & MISHLER, P.C.
Attorneys for Proposed Amicus Curiae
One Columbia Place
Albany, New York 12207
(518) 462-6753

TABLE OF CONTENTS

Page

INTRODUCTION 1

INTEREST OF THE AMICUS 2

THE UNDERLYING ISSUE 2

THIS COURT'S OPINION AND REMAND ORDER OF JUNE 29, 1989 3

THE ISSUE PRESENTED FOR REVIEW 5

I. THE UNFAIRNESS IN THE WAY THE STUDENT PLAINTIFFS HAVE BEEN TREATED BY THE LOWER COURTS SINCE THIS COURT'S REMAND ORDER SIX YEARS AGO 6

II. IMPORTANT LEGAL CONSIDERATIONS – THAT ADVERSELY IMPAIR CONGRESSIONAL INTENT TO ENCOURAGE PRIVATE LITIGATION TO ENFORCE CONSTITUTIONAL RIGHTS – ARE IMPACTED BY A NARROW AND STRICT APPLICATION OF THE MOOTNESS DOCTRINE 7

III. CONCLUSION 11

TABLE OF CASES AND AUTHORITIES

State University of New York Board of Trustees Resolutions 66-156, 73-26 and 79-100 2

"Civil Rights Attorney's Fees Awards in Moot Cases", 49 U. Chi. L. Rev. 819 7

No. 94-1819

In The

Supreme Court of the United States

October Term, 1994

TODD FOX, *et al.*,

Petitioners,

v.

THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PROPOSED BRIEF OF AMICUS CURIAE THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Student Association of the State University of New York, Inc. (SASU) endorses and supports the position of the student petitioners in the above-captioned matter. This proposed brief is presented to the Court along with the motion of proposed *amicus curiae* for permission to file a brief *amicus curiae*. Consent to file this brief was denied by counsel for respondents.

INTEREST OF THE AMICUS

The Student Association of the State University of New York, Inc. (SASU), was founded in 1970 and represents the interests of 390,000 students of the State University system.

The functions of SASU are to represent, advocate and further the interests and welfare of the students of the State University of New York. SASU does this by lobbying in the New York State Legislature and the Executive Branch on behalf of students, litigating issues of students' rights and developing programs for purposes which benefit students of the State University of New York SUNY.

SASU is committed to protecting and expanding the rights of college and university students. SASU has a particular interest in eliminating the remaining vestiges of *in loco parentis* policies in the State University system.

Of the 64 campuses in the New York State University system, approximately 25 campuses, including all of the largest colleges and universities, have state-owned dormitories. One or two campuses have privately owned dormitories.

THE UNDERLYING ISSUE

The underlying issue on which this Court heard argument, issued an opinion and remanded to the lower court six years ago in its Opinion and Order of June 29, 1989 concerned the constitutionality of Resolution 66-156 of the Board of Trustees of the State University of New York, as amended by Resolution 73-26 and 79-100. This

regulation, with certain exceptions not here relevant, denies "authorization . . . to private commercial enterprises to operate on the State University campuses".

The regulation, as interpreted and applied by SUNY at its individual campuses, prevented students from using their private rented dormitory rooms – as a place to receive – and enjoy the exercise of the first amendment rights, through the presence and speech of their invited guests, who were sellers of goods and offering professional services.

This total ban included sales demonstrations, by invited or others off campus, not only regarding commercial goods, but also visits from lawyers, doctors, private tutors, or any other professional people who "sought to make a profit" from the visit.

THIS COURT'S OPINION AND REMAND ORDER OF JUNE 29, 1989

This Court found SUNY's limitations on professional speech subject to all the protections of pure free speech and found for plaintiffs. It rejected SUNY's contention, as the party seeking Certiorari, that its right to limit speech should be judged by the "rational basis", public forum test; and remanded the *commercial speech* issue to be resolved under a revised constitutional standard.

The balance of the Statement of the Case and procedural history of what occurred after this Court's Opinion and remand order six years ago is fully and accurately stated in the Student Plaintiffs' Petition. It need not be restated here other than to point out how the

lower court, having granted plaintiffs' leave to amend to add new parties in response to defendant's belated motion to dismiss for mootness, that was filed after remand to the district court, reversed its order after waiting two years, and threw the case out on the grounds that there was no case or controversy. (For quick convenient reference to the principal procedural events and the extraordinary delays encountered in this case see the Student Plaintiffs' "Timeline" in the Appendix to its Petition, pp. 1a-2a).

This Association, believing that the issues raised in Plaintiff's original action involved important constitutional issues for college and university students, filed an Amicus Brief with this Court on December 28, 1988 supporting the plaintiffs, as respondents.

Now, the Association respectfully requests, for the reasons set forth in Plaintiffs' Petition, which it fully supports, and the additional reasons set forth below, that this Court will without further delay,[1] or after further briefs and argument direct that all issues in this case be finally decided at the earliest possible date consistent with principles of fairness and due process.

---

[1] See fn. 16 at Petition, p. 30, where Petitioners invite this Court alternatively to consider *summary disposition* on two different legal grounds, with citations in that footnote to relevant portions of the Petition.

THE ISSUE PRESENTED FOR REVIEW

This Amicus Brief will not restate the issue for review, as presented in the Student Plaintiffs' Petition, which it adopts. Nor will it focus on that portion of their Statement and development of the important constitutional issues in its petition, as impacted by the mootness doctrine, bearing on basic "certworthy" issues. This appears in:

- their extensive analysis of the "mootness doctrine" conflicts in the cases, both *within the Circuits* and *among the Justices of this Court*, [see Petition pp. 7-22]: and

- the frequency with which this issue arises and why it should be decided now and put to rest. [see Petition pp. 14-16]

Rather, this brief focuses on two critical issues and concerns to student members of this Association, students in colleges and universities through the nation:

First, the unfairness in the way this case and these plaintiffs were treated by the lower courts, following remand by this Court, and those courts' response to the good faith efforts of representative leaders of student government to establish their rights under the U.S. Constitution; and

Second, to stress, if the procedural finding of mootness in this case is not reviewed and reversed by this Court, the serious and adverse impact it will have, not only on them, but on all students and private litigants in the future in their efforts to secure competent counsel.

This in turn will undermine, as discussed below, the clearly expressed intent of the Congress in adopting 42 U.S.C. §1988 to encourage enforcement of private rights guaranteed the people by Acts of the Congress and the Constitution by awarding legal fees to the plaintiffs, as prevailing parties.

I. THE UNFAIRNESS IN THE WAY THE STUDENT PLAINTIFFS HAVE BEEN TREATED BY THE LOWER COURTS SINCE THIS COURT'S REMAND ORDER SIX YEARS AGO

It would serve no purpose to burden this brief with a detailed discussion of the unfairness to the student plaintiffs, given the thoroughness of the Plaintiff's Petition. See Petition at page 7 and Section 3B., pp. 24-25 and pp. 28-29.

Suffice it to say that taking 13 years to resolve an important constitutional case, and then dismissing the case for mootness because all the original students have graduated or left, does not reflect well on the justice system. And equally understandable, is the poor impression of justice given to the plaintiff students and other students throughout the country in this, their first exposure to the federal system of civil justice.

Much of this poor impression can be ameliorated if this Court moves promptly to direct that all open issues be resolved as soon as practicable.

II. IMPORTANT LEGAL CONSIDERATIONS – THAT ADVERSELY IMPAIR CONGRESSIONAL INTENT TO ENCOURAGE PRIVATE LITIGATION TO ENFORCE CONSTITUTIONAL RIGHTS – ARE IMPACTED BY A NARROW AND STRICT APPLICATION OF THE MOOTNESS DOCTRINE

One of the major reasons for filing this Amicus Brief is to call to this Court's attention the genuine concern of students in public colleges and universities of the impact of the lower courts' decision if not reversed, on future efforts to secure competent counsel to represent them in important constitutional or civil rights actions.

As support for this concern, we call to the Court's attention certain perceptive extracts from a Comment entitled *Civil Rights Attorney's Fees Awards In Moot Cases* in the Summer, 1982 issue of the University of Chicago Law Review 49 U. Chi. L.Rev. 819.

Speaking to the difficulties encountered in securing counsel in "civil rights" cases, the writer states, at page 821:

> "Despite the premium most people place on their civil rights, there are two serious disincentives to bringing private suits to enforce those rights:
>
> • First, because civil rights remedies often are only equitable, a plaintiff must finance the litigation without hope of recovering a damage award out of which to pay a lawyer. Few people can afford this cost.
>
> • Second, even when the public would benefit greatly from a suit, there is little incentive for any one individual to undertake the lawsuit

> because he would be paying for benefits he could receive free if someone else brought the suit." (footnotes omitted)

The writer goes on to state, at pages 821-22, as noted below:

> "To overcome these disincentives, Congress included attorney's fees awards provisions in many of the modern civil rights statutes, and fees are commonly awarded in suits brought under those statutes. The possibility of recovering fees promotes private civil rights litigation and enforcement in four ways:
>
> • First, the prospect of payment attracts lawyers to impecunious plaintiffs;
>
> • Second, it encourages speedy resolution of rights violations. If a defendant has a losing case dragging out the litigation through legal gamesmanship it will only increase the cost he will have to bear in the end;
>
> • Third, fees awards deter rights violations by adding to the liability of violators who are caught;
>
> • Finally, by increasing the number of enforcement suits, fees awards raise the probability that any given violator will be found liable and be penalized. (footnotes omitted)

Plaintiffs' petition as noted below, documents the particular validity of item "second" of the above points, that comment on the situation of a defendant with a "losing case dragging out the litigation through legal gamesmanship".

See for example:

• Petition at Question Presented for Review, p. i; Reasons for Granting the Writ, pp. 7-8; and Section D. Judicial Considerations, pp. 27-28.

• See in particular fn. 15 where the transcript of oral argument in 1993 before the 2nd Cir. CA validates this very point. The Petition at pp. 28-29 states as follows:

> In fact, the record at oral argument on December 16, 1993, in this very case, before a panel of the Second Circuit Court of Appeals, on plaintiff's appeal from the District Court's finding of mootness, establishes this very point – SUNY's real motive, in pressing its mootness defense so vigorously, was to avoid the State's liability to plaintiffs for legal fees, extending over a twelve year period.

Fn. 15 reads as follows:

> During argument by SUNY's counsel, the electronic transcript of the record furnished by the Clerk's office for the Second Circuit Court of Appeals shows that Judge Winter perceptively identified one of the underlying issues in this case, when he stated to SUNY's counsel:
>
> "*By Judge Winter*: The real problem in this case is that the case has gone on for twelve years and if the mootness argument prevails, the state gets to hang onto legal fees that the plaintiffs would be entitled to in a losing first amendment case, and obviously we can see why this point is very heavily litigated.
>
> *By Mr. Smirlock*: You talk about a losing First Amendment case. So far not so, Your Honor. We are back in the District Court from

adjudication. Obviously legal fees are at issue here."

Almost at the very end of SUNY's counsel's argument, Judge Winter asked SUNY why the State was taking such a "rigid position" and in not modifying the Regulation at least as to pure free speech.

The colloquy below, and particularly SUNY's counsel's answer, further corroborates the concern regarding a rigid application of the mootness defense to a case such as this.

> *By Judge Winter*: I just have one other question. What is wrong with reforming the statute to exclude from its coverage people such as doctors, lawyers and others who might be invited on the campus to perform a service, particularly an emergency service, to allow it? Why is the state taking such a rigid position on the regulation?
>
> *By Mr. Smirlock*: I think partly because of the attorney's fees, Your Honor. I will be glad to submit the brief that we have put in the District Court on the merits. I think strategically we're taking the position on the same reason they're taking the position and just now starting over with new plaintiffs".

Respectfully, this is a highly inappropriate use of the "mootness defense" and should not be countenanced by any court.

III. CONCLUSION

For all the foregoing reasons, this Association filing this proposed Amicus Brief urges Your Honorable Court to grant the relief as asked for by Petitioners in their Conclusion or alternatively in fn. 16 at page 30.

Dated: June 2, 1995
Albany, New York

Respectfully submitted,

LANNY E. WALTER, ESQ.
Counsel of Record
MARK S. MISHLER, ESQ.
WALTER, THAYER & MISHLER, P.C.
Attorneys for Proposed Amicus Curiae
One Columbia Place
Albany, New York 12207
(518) 462-6753